

# **Exhibit A**

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 UNIFORMED FIRE OFFICERS  
5 ASSOCIATION, et al.,

6 Plaintiffs,

7 v.

8 20 CV 5441 (KPF)  
9 Telephone Conference

10 BILL de BLASIO, et al.,

11 Defendants.

12 -----x  
13 New York, N.Y.  
14 July 22, 2020  
15 4:25 p.m.

16 Before:

17 HON. KATHERINE POLK FAILLA,

18 District Judge

19 APPEARANCES

20 DLA PIPER LLP  
21 Attorneys for Plaintiffs  
22 BY: ANTHONY PAUL COLES  
23 COURTNEY SALESKI

24 JAMES E. JOHNSON  
25 Corporation Counsel of the City of New York  
BY: DOMINIQUE F. SAINT-FORT  
REBECCA GIBSON QUINN  
Assistant Corporation Counsel

NEW YORK CIVIL LIBERTIES UNION  
Amicus  
BY: CHRISTOPHER DUNN

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1                   Ms. Quinn, is there other information you want me to  
2 be aware of?

3                   MS. QUINN: That is all that I'm aware of.

4                   THE COURT: Okay.

5                   Did you make Mr. Coles aware of this before you told  
6 me? Is this the first time both of us are hearing this  
7 information?

8                   MS. QUINN: This is the first time. Unfortunately, I  
9 just received this information now, not -- moments before the  
10 call.

11                  THE COURT: Of course. All right. Thank you.

12                  Let me, then, please go forward. It's interesting. I  
13 had started -- in the hour that we were apart, I typed up some  
14 notes for a decision, and I'm going to read it into the record  
15 now, but I began the whole thing by noting that my focus was  
16 based, in large measure, on the representations of Corporation  
17 Counsel, that I have been, and, indeed, we have been, focusing  
18 on the NYPD materials.

19                  Let me just pause for a moment. You're hearing both  
20 demonstrators outside the courthouse and lightning and thunder  
21 going on right now. So, if I am occasionally interrupted, that  
22 is why.

23                  In any event, I've been focusing on the NYPD materials  
24 because I understand, and I continue to understand, that the  
25 FDNY materials are matters that are OATH matters that already

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1 are, and have been previously, accessible by a website to which  
2 I have been referred. And I understood, as well, that the  
3 focus of the DOCCS materials were substantiated, founded, and  
4 final resolutions of complaints and that there was no problem  
5 with those. So, that leaves the NYPD materials.

6 And, as plaintiffs' counsel have described them for me  
7 specifically, complaints that are unsubstantiated or unfounded,  
8 those in which the officer has been exonerated, and those that  
9 are, I'll say, pending -- we could also say nonfinal, as  
10 well -- there was some discussion in the papers and a little  
11 bit of discussion today about settlement agreements that were  
12 entered into prior to June 12th of 2020, and as to those  
13 materials, I am granting the temporary restraining order, and I  
14 am enjoining the defendants and anyone acting in concert with  
15 them from publicly disclosing those materials.

16 Now, we have this problem, because I initially noted  
17 that there was a tranche of CCRB materials that falls within  
18 the definition that I've just outlined that has been turned  
19 over to the New York Civil Liberties Union, and it was my hope  
20 that Mr. Dunn would consent, in the short term at least,  
21 voluntarily to refraining from disclosing them any further than  
22 they've already been disclosed internally or externally, and  
23 that the New York Civil Liberties Union would agree that they  
24 would not disclose them further.

25 Mr. Dunn, are you willing to make such a

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1 representation, or do I need to actually have findings on the  
2 matter and an actual order of injunction?

3 MR. DUNN: Your Honor, we are not prepared to agree to  
4 that.

5 THE COURT: Okay, fine.

6 Then, given what I've heard at this hearing, which  
7 includes the rather curious timing and the remarkable speed of  
8 the filing of your FOIL request and its response while they  
9 were in discussion, hoping to forestall litigation, I am  
10 ordering you not to disclose those materials any further than  
11 you have internally or externally. And I am ordering you to  
12 advise those to whom you have disclosed them to not disclose  
13 them further. And if we have to have additional proceedings on  
14 that, that's fine; you can write more substantial papers, and  
15 we'll have a proceeding for that. For now, that is the  
16 temporary injunction.

17 Proceeding now to the law which explains what I have  
18 just done:

19 A party seeking a temporary restraining order or a  
20 preliminary injunction must show irreparable harm and either a  
21 likelihood of success on the merits or sufficiently serious  
22 questions going to the merits to make them a fair ground for  
23 litigation and a balance of hardships tipping decidedly toward  
24 the party requesting the preliminary relief. I am quoting here  
25 from *Cacchillo v. Insmed*, a Second Circuit decision reported at

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1 638 F.3d 401. Another example would be *Waldman Publishing*  
2 *Company v. Landoll, Incorporated*, using the standard in the  
3 context of a temporary restraining order.

4 Many courts have found, and have identified, the  
5 showing of irreparable harm as the single most important  
6 prerequisite for the issuance of a temporary restraining order.  
7 And such harm must be shown to be imminent and not remote or  
8 speculative and the alleged injury must be one incapable of  
9 being fully remedied by monetary damages. As one example of  
10 that, I cite *Local 1814, International Longshoremen's*  
11 *Association v. New York Shipping Association*, 965 F.2d 1224  
12 (2d Cir. 1992). And likelihood of success on the merits does  
13 not require that the party demonstrate that it is an absolute  
14 certainty, only that the probability of prevailing is better  
15 than 50 percent. On that last point, I am citing to and  
16 quoting from *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir.  
17 1985). To me, this particular motion rises and falls on the  
18 irreparable harm element, and as I read through the papers of  
19 both sides, which were very well written, especially given the  
20 time crunches each side had, I was reminded of metaphors which  
21 kept coming to mind involving horses, and barns, and milk that  
22 is spilled and bells that have been rung, but the point of the  
23 metaphors, and the reason they have relevance to this analysis,  
24 is that if I don't stay -- at least enter a temporary  
25 restraining order -- it would seem to me that the case is over.

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1 And it also, I've now been told, would have a dramatically  
2 deleterious impact on the related arbitration.

3 Defendants don't actually really engage on this point.  
4 They argue, instead, that any such harm would not be  
5 irreparable or that it would be speculative, but accepting as  
6 true the well-pleaded allegations of plaintiffs' pleading, and  
7 reviewing the materials that I have received, and talking to  
8 counsel today, I can't agree with that proposition. I believe  
9 there to be serious issues that transcend reputation, that  
10 affect employment, that affect safety, and I am accepting those  
11 harms as not speculative and imminent for purposes of today's  
12 proceeding. I'm not going to say that all of plaintiffs'  
13 claims have equal traction, but I am going to say that they  
14 have raised sufficiently serious questions going to the merits,  
15 particularly on the contractual claims, and perhaps less so on  
16 the constitutional claims, that a TRO is warranted.

17 Conversely, I do believe the public interests are not  
18 disserved by any such TRO, and I don't believe that the  
19 defendants are harmed by a brief delay in implementing the  
20 disclosures that they've contemplated making post repeal of  
21 50-a if, indeed, we ultimately conclude that the plaintiffs  
22 have alleged a viable claim.

23 The next issue for me is that of discovery. But,  
24 actually, before I get to that, I do have to, I suppose, speak  
25 about injunctive relief. So, it was easy enough to say don't

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disclose anything further, but now I understand that the CCRB has done just that. So, I'm going to have to order them to change their trial calendars to go back to the way that it was prior to the repeal, where there was a date, a precinct, and an incident as described using the FADO, F-A-D-O, metric, without reference to the name of the officer. And I'm sure they will be able to do that promptly.

So then the next issue is that of discovery, and I must say my initial inclination was not to schedule discovery, but given what has become evolving answers to questions that I've posed during this proceeding, including an evolution of an answer while I was on a break writing this opinion, and accepting, as well, plaintiffs' counsel's assertion that he received still different answers when he asked the questions of affected parties, and when folks affiliated with his clients made those requests of the affected parties, I'm going to allow limited discovery over the next approximately two weeks, to conclude on August 7th of 2020. To my mind, the areas of discovery that matter include the following: A final answer from each of the organizational defendants concerning precisely what materials are contemplated to be disclosed, in what format, where they will be disclosed, and when that disclosure is to take place. And I believe, as well, there can be limited discovery into the timing or the circumstances of the CCRB's response to the FOIL request. I'm candidly less interested in

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1 Mr. Dunn's request inasmuch as he basically has given me an  
2 explanation of it today. I am trying to figure out how the  
3 CCRB broke land speed records in order to provide an answer to  
4 it. If the plaintiffs want additional discovery -- I  
5 understand they've already propounded certain requests -- they  
6 are invited to meet and confer with defendants, and they can  
7 come to me with disputes, but, of course, that's got to be done  
8 very quickly.

9 So the issue, then, is how long is this TRO to last?  
10 Under Rule 65 of the Federal Rules of Civil Procedure, the  
11 order expires at the time after entry not to exceed 14 days  
12 that the Court sets unless before that time, the Court, for  
13 good cause, extends it for a like period or the adverse party  
14 consents to a longer extension, and the reasons for extension  
15 must be entered on the record.

16 I am going out slightly longer. The preliminary  
17 injunction hearing in this case will take place on Tuesday,  
18 August 18, at 2:00 p.m. I'm going out slightly longer than the  
19 14 days, for several reasons, but principally two. The first  
20 is the fact that I have allowed discovery, limited discovery,  
21 in this case. The second is that I can already foresee delays  
22 and difficulties in getting that discovery and getting the  
23 materials together for the preliminary injunction hearing  
24 occasioned by the COVID-19 pandemic and folks who have issues  
25 in getting to their offices. So, for those reasons, I'm going

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1 out slightly beyond the 14 days.

2 Now, the parties have made their cases to me orally  
3 and in writing. It may be that supplemental briefing is  
4 necessary after discovery. I suspect both sides will feel that  
5 it is. If you feel the need to submit additional briefing to  
6 me, I'd ask you to keep it as simple as possible, not to repeat  
7 yourself, and to submit it by August 14th of 2020.

8 Mr. Dunn, I did want to hear from you, sir, as well,  
9 in connection with this proceeding. Just looking at the  
10 calendar, perhaps the 14th may not give you sufficient time,  
11 but let me talk to you on that point. It seems to me,  
12 Mr. Dunn, that you don't need to consult with the parties as  
13 much as to provide your organization's thoughts on the law and  
14 how it should be applied to the facts of this case.

15 So, may I ask for your amicus brief, as well, on the  
16 14th, or is that an impossibility?

17 MR. DUNN: Your Honor, that is fine, of course. But I  
18 would -- if you would allow, I do ask that you give me an  
19 opportunity to address the order that you have directed towards  
20 us. I did not have any opportunity to address it during the  
21 arguments. There's no briefing on this, and we are not a party  
22 to this action. The Court doesn't have any jurisdiction over  
23 us. I would like to at least be able to address to you my  
24 considerations around that because I don't believe there's any  
25 basis for this Court to order any relief against NYCLU at this

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1 point.

2 THE COURT: Sir, I actually would welcome the  
3 opportunity to have briefing on that. I suspect that you're  
4 not going to have any disputes with defendants.

5 Can I ask you to work with plaintiffs' counsel to put  
6 together a highly expedited briefing schedule that works for  
7 both of you? And can I ask you, at least for now, to abide by  
8 my instructions, even if later, I agree with you that I don't  
9 have the jurisdiction to issue them?

10 MR. DUNN: Well, your Honor, frankly, I've appeared in  
11 this court -- I have not appeared before you -- I'm very  
12 mindful of a request like that, but I'm sure, as you  
13 appreciate, we are not a party to this litigation.

14 THE COURT: All right.

15 MR. DUNN: I don't think it's a novel thought to  
16 say -- I say this with all due respect -- the Court doesn't  
17 have any jurisdiction over the NYCLU as a nonparty, and so I  
18 would submit to you that I understand what you're saying and  
19 the request, but I don't believe there's any basis for any  
20 valid order, given we're simply not a party.

21 THE COURT: I'm going to ask you, please, to never use  
22 the construction "with all due respect" whenever speaking with  
23 me because that always is followed by some expression of  
24 disrespect. So just don't do it.

25 MR. DUNN: Okay.

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1                   THE COURT: Give me something tomorrow, and I'll get  
2 something from plaintiffs, if plaintiffs want to say anything  
3 within a day, and I'll rule on it. I do want to hear from you  
4 on it, sir, most definitely.

5                   MR. DUNN: Okay. Well, I will do that, of course, but  
6 I guess what I am saying to you is, right now, the Court, as  
7 far as we are concerned, has no jurisdiction over us  
8 whatsoever.

9                   THE COURT: Okay.

10                  MR. DUNN: And an order from you, I don't believe  
11 there's any basis for that to have any legal effect since we  
12 are a stranger in terms of being a party to the Court.

13                  THE COURT: I do understand your position, sir. I  
14 want to see it executed in writing. Are you willing to do  
15 that?

16                  MR. DUNN: Of course.

17                  THE COURT: All right.

18                  I know, and you're going to keep telling me, we're  
19 going to get into an infinite loop here, sir. I appreciate  
20 your view that I have no jurisdiction -- I might even come to  
21 agree with you -- I want to see something, I want to have  
22 something other than an hour or two of oral argument on things  
23 that don't quite necessarily touch on this issue, sir.

24                  MR. DUNN: I understand completely. I'm put in a very  
25 awkward position because you are issuing something you are

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1 describing as an order that binds the NYCLU and -- well, you  
2 understand our position. So I hear what you're saying. We  
3 will, of course, submit something tomorrow, but I must say, in  
4 all my years of practice, I've never faced this situation where  
5 we have a Court directing us to do something when we are not a  
6 party to a litigation or a case that is actually before the  
7 Court.

8 THE COURT: No, sir, sure. I guess the issue is  
9 earlier on in my decision, I did make a factual finding that  
10 you were acting in concert with the defendants, and I thought  
11 that would have been enough.

12 MR. DUNN: I see. Okay. I didn't understand you to  
13 be making that finding.

14 THE COURT: Oh, no, I am, I am. It is made. And if  
15 that changes your arguments, that's fine, too.

16 So, are you technically a party to this litigation,  
17 sir? You are not. Did I making a finding that you are acting  
18 in concert with the defendants on disclosure of this  
19 information? I did.

20 MR. DUNN: Okay.

21 THE COURT: All right. But if you want to write me  
22 about why that's absolutely wrong, sir, it's not my intention  
23 to get things wrong, it's my intention to get things right, but  
24 I certainly would like to hear from you before making any  
25 further decision.